Study Em-458 March 13, 2000

Memorandum 2000-24

Early Disclosure of Valuation Data and Resolution of Issues in Eminent Domain

OUTLINE

BACKGROUND

At the February meeting, the Commission decided to attempt to develop a package of consensus improvements in the law that will facilitate resolution of eminent domain cases without the need for trial. Specific ideas to be considered include (1) requiring an exchange of valuation data 90 days before trial, coupled with (2) a process enabling early resolution of legal disputes and (3) some form of encouragement of alternative dispute resolution. (4) More detailed disclosure of prelitigation appraisal information should also be considered for inclusion in this package, along with (5) a requirement that positions on loss of business goodwill be disclosed in the valuation data exchange (pursuant to an earlier Commission recommendation).

This memorandum presents drafts, and raises policy questions, concerning these concepts. Our objective is to further develop them with the goal of putting together a tentative recommendation that can be circulated to interested persons and entities for comment.

MORE DETAILED SUMMARY OF PRELITIGATION APPRAISAL

There are two statutorily-required appraisals performed by the condemnor before the litigation positions of the parties are solidified in their final pretrial offers and demands:

- Under the Relocation Assistance Act, before a condemnor commences proceedings it must appraise the property and provide the owner a written statement of, "and summary of the basis for," the amount it offers as just compensation. Gov't Code §§ 7267.1–7267.2.
- After the proceeding is commenced, the condemnor ordinarily makes a prejudgment deposit of probable compensation, based on the condemnor's appraisal of the property. The condemnor must give the property owner notice of the deposit and "a written statement or summary of the basis for the appraisal." Code Civ. Proc. §§ 1255.010-1255.020.

Norm Matteoni has indicated that the data provided to the property owner in these two instances lacks sufficient detail to enable a property owner to evaluate and act rationally in response to the condemnor's offer. Most agencies do not provide a list or a representative number of comparable sales. If the condemning agency were required to set forth some of the basic data on which its appraisal is based, that would engage the parties in early discussion, with a greater chance for a negotiated settlement.

Relocation Assistance Act

Mr. Matteoni's concern appears to be directed primarily towards commercial properties. The Relocation Assistance Act already requires disclosure of the appraisal itself (as opposed to a summary of the basis for the amount established as just compensation) for an owner-occupied residence. "Where the property involved is owner occupied residential property and contains no more than four residential units, the homeowner shall, upon request, be allowed to review a copy of the appraisal upon which the offer is based." Gov't Code § 7267.2(a). This is consistent with anecdotal information we have received that residential takings are almost always settled and do not go to trial; it is only commercial takings that are at issue.

A revision of the Relocation Assistance Act to require specified detail in the summary of the basis for the amount established as just compensation might look something like this:

Gov't Code § 7267.2 (amended). Precondemnation offer

7267.2. (a) Prior to adopting a resolution of necessity pursuant to Section 1245.230 and initiating negotiations for the acquisition of real property, the public entity shall establish an amount which it believes to be just compensation therefor, and shall make an offer to the owner or owners of record to acquire the property for the full amount so established, unless the owner cannot be located with reasonable diligence. The offer may be conditioned upon the legislative body's ratification of the offer by execution of a contract of acquisition or adoption of a resolution of necessity or both. In no event shall the amount be less than the public entity's approved appraisal of the fair market value of the property. Any decrease or increase in the fair market value of real property to be acquired prior to the date of valuation caused by the public improvement for which the property is acquired, or by the likelihood that the property would be acquired for the improvement, other than that due to physical deterioration within the reasonable control of the owner or occupant, shall be disregarded in determining the compensation for the property. The public entity shall provide the owner of real property to be acquired with a written statement of, and summary of the basis for, the amount it established as just compensation. Where the property involved is owner occupied residential property and contains no more than four residential units, the homeowner shall, upon request, be allowed to review a copy of the appraisal upon which the offer is based. Where appropriate, the just compensation for the real property acquired and for damages to remaining real property shall be separately stated. The summary shall contain detail sufficient to indicate clearly the basis for the amount established as just compensation, including but not limited to all of the following information:

(1) If the amount established as just compensation is based on market data, the principal transactions supporting that amount.

(2) If the amount established as just compensation is based on damages to remaining real property, the calculations and a narrative explanation supporting that amount.

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Comment. Subdivision (a) of Section 7267.2 is amended to prescribe the contents of the summary of the amount established as just compensation. It should be noted that the appraisal referred to in subdivision (a) is a written statement independently and impartially prepared by a qualified appraiser setting forth an

opinion of defined value of an adequately described property as of a specific date, supported by the presentation and analysis of relevant market information. Section 7260.

Prejudgment Deposit

A revision of the prejudgment deposit statute to require specified detail in the written statement of, or summary of the basis for, the appraisal might look something like this:

> **Code Civ. Proc. § 1255.010 (amended). Deposit of probable compensation**
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> 1255.010. (a) At any time before entry of judgment, the plaintiff may deposit with the State Treasury the probable amount of compensation, based on an appraisal, that will be awarded in the proceeding. The appraisal upon which the deposit is based shall be one that satisfies the requirements of subdivision (b). The deposit may be made whether or not the plaintiff applies for an order for possession or intends to do so.
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> (b) Before making a deposit under this section, the plaintiff shall have an expert qualified to express an opinion as to the value of the property (1) make an appraisal of the property and (2) prepare a written statement of, or summary of the basis for, the appraisal. The statement or summary shall contain detail sufficient to indicate clearly the basis for the appraisal, including but not limited to all of the following information:
>
> (1) If the appraisal is based on market data, the principal transactions supporting the appraisal.
>
> (2) If the appraisal is based on compensation for injury to the remainder, the calculations and a narrative explanation supporting the appraisal.
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> **Comment.** Subdivision (b) of Section 1255.010 is amended to prescribe the contents of the written statement or summary of the basis for the deposit appraisal. The accuracy of such an appraisal is judicially reviewable pursuant to Section 1255.030 (increase or decrease in amount of deposit).
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> **Code Civ. Proc. § 1255.030 (amended). Increase or decrease in amount of deposit**
>
> 1255.030. (a) At any time after a deposit has been made pursuant to this article, the court shall, upon motion of the plaintiff or of any party having an interest in the property for which the deposit was made, determine or redetermine whether the amount deposited is the probable amount of compensation that will be awarded in the proceeding. In making a determination or redetermination, the court may consider the accuracy of the

appraisal on which the deposit is based, as detailed in the written statement or summary of the basis for the appraisal referred to in Section 1255.010.

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Comment. Subdivision (a) of Section 1255.030 is amended to recognize the role of the appraisal on which the deposit is based. A written statement or summary of the basis for the appraisal must be prepared pursuant to Section 1255.010.

Caltrans attorneys have indicated they do not believe it is appropriate to address the prejudgment deposit appraisal in the context of seeking early exchange of information and possible dispute resolution. Prejudgment deposit appraisals are used to support the condemnor's initial offer and are not typically those used at trial or exchanged with the property owner. The Caltrans attorneys would leave these issues out of the current mix, and address them in a different context if necessary.

Use at Trial of Prejudgment Deposit Appraisal

In an effort to encourage the adequacy of the prejudgment deposit, the law protects the deposit and underlying appraisal from being used against the condemnor at trial. Code Civ. Proc. § 1255.060. A current court of appeal case deals with this issue. In *Community Redevelopment Agency of Los Angeles v. World Wide Enterprises*, 2000 Daily Journal D.A.R. 1125 (Feb. 1, 2000), the trial appraisal prepared by the condemnor's outside appraiser turned out to be 20% lower than the prejudgment deposit appraisal prepared by the same appraiser (a difference of $200,000). The issue in the case is whether the property owner is allowed to impeach the appraiser's trial testimony with evidence of the higher prejudgment deposit appraisal. The Second Appellate District Court of Appeal initially held that evidence of the prejudgment deposit appraisal is inadmissible — the policy of the law is to encourage an adequate prejudgment deposit by ensuring that it will not be used against the condemnor at trial. (This conflicts with a 1994 First Appellate District decision.) The court has granted a rehearing of the matter.

It should be noted that the appraiser in this case offered a justification for the lower trial appraisal. The earlier appraisal was made subject to the assumption that the property was in sound physical condition and free of toxic substances. By the time of trial the condemnor had taken possession of the property, investigated its condition, and discovered the assumption to be incorrect. The

trial appraisal was reduced to reflect the cost of demolition and asbestos abatement.

Gideon Kanner has criticized this decision, as well as the statute on which it is based. The staff suggests that we hold off considering this matter until the case is resolved. We will have a better idea then of what the law is, and whether it is in need of further work.

Use at Trial of Appraisal under Relocation Assistance Act

Should the precondemnation appraisal under the Relocation Assistance Act be given protection at trial, just as the prejudgment deposit appraisal is? Gideon Kanner believes the policy of the prejudgment deposit statute is wrong. Protecting the appraisal does not encourage a more adequate offer, it simply fosters condemnor low-balling by making inadmissible otherwise relevant and probative evidence.

As a general matter, it has been the Commission's policy to protect the confidentiality of communications made for the purpose of attempting to settle a dispute without litigation. The Commission has recommended legislation this session, for example, to generally protect communications made during settlement negotiations against disclosure at trial. See *Admissibility, Discoverability, and Confidentiality of Settlement Negotiations*, 29 Cal. L. Revision Comm'n Reports 345 (1999).

Protection of the condemnor's prelitigation appraisal in order to encourage its adequacy would be consistent also with the purpose of the Relocation Assistance statute. See Gov't Code §§ 7267 (purpose of statute "to encourage and expedite the acquisition of real property by agreements with owners, to avoid litigation and relieve congestion in the courts"), 7267.1 (public entity shall make every reasonable effort "to acquire expeditiously real property by negotiation").

On the other hand, the prelitigation appraisal is explicitly made admissible for the purpose of determining the amount of litigation expenses the property owner may be entitled to. "In determining the amount of such litigation expenses, the court shall consider the offer required to be made by the plaintiff pursuant to Section 7267.2 of the Government Code and any other written offers and demands filed and served prior to or during the trial." Code Civ. Proc. § 1250.410.

Moreover, the California Relocation Assistance Act codifies federally mandated property acquisition policies for projects in which federal funds are

involved. The federally mandated policies do not suggest that the required appraisal should in any manner be protected from use in subsequent litigation. It is not clear whether a provision protecting the prelitigation appraisal from subsequent use against the condemnor would be deemed to violate the federal property acquisition policies.

The key policy consideration comes down to this: If we protect preliminary appraisal data from being used against the condemnor at trial, will this encourage the condemnor to be more liberal in the effort to obtain a settlement, or will it simply enable the condemnor to improperly pressure the property owner by offering a bare minimum with the threat that at trial the condemnor will be able to low-ball the property owner with impunity? The Commission needs to make a judgment on this issue.

EARLY EXCHANGE OF VALUATION DATA

Historically, special eminent domain discovery statutes have provided for a mutual exchange of valuation data 40 days before trial. Code Civ. Proc. § 1258.220. Effective January 1, 2000, legislation sponsored by Caltrans pushes the exchange back to 60 days before trial. The argument in support of this legislation is that the extended time period gives both parties an adequate opportunity to examine each other's valuation data and depose expert witnesses before making a final pretrial offer or demand. This should facilitate reasonable offers and demands, resulting in a greater number of settlements. It could also yield reduced court costs.

Since the new legislation has just become operative, we have no experience under it. However, Michael Nave has argued that 60 days is still not enough time and that it needs to be doubled, to 120 days. This would enable the condemnor and property owner to complete discovery and obtain rulings on valuation-related *in limine* motions which, in turn, would allow the parties to make better-reasoned final offers.

On the other hand, Norm Matteoni and Gideon Kanner have argued that a 120-day exchange date is unrealistic for the property owner. Whereas the condemnor may have plenty of advance time to prepare and may have appraisal experts already available, it takes a property owner time to gear up for the proceeding.

A similar concern has been expressed by Caltrans attorneys, who likewise believe there must be adequate time between the date of the filing and service of summons and complaint and the date of exchange to allow the parties to complete initial discovery and to obtain appraisals from their expert witnesses. They have suggested that one approach could be to resolve some of the timing issues at the status or case management conference.

At the February meeting the Commission decided to split the difference and try a 90-day exchange date — midway between the new 60 day rule and the proposed 120-day rule. Discussion at the meeting seemed to indicate that 90 days could be workable. Such a provision would look like this:

> **Code Civ. Proc. § 1258.220 (amended). Date of exchange**
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> 1258.220. For the purposes of this article, the "date of exchange" is the date agreed to for the exchange of their lists of expert witnesses and statements of valuation data by the party who served a demand and the party on whom the demand was served or, failing ~~such~~ agreement, a date ~~60~~ 90 days prior to commencement of the trial on the issue of compensation or the date set by the court on noticed motion of either party establishing good cause therefor.
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> **Comment.** Section 1258.220 is amended to make the exchange date 90, rather than 60, days before trial on the issue of compensation.

VALUATION DATA EXCHANGED

The Commission has recommended that the valuation data exchanged include details on claimed loss of goodwill. See *Compensation for Loss of Business Goodwill in Eminent Domain: Selected Issues,* 29 Cal. L. Revision Comm'n Reports 719 (1999). The proposed legislation would provide:

> **Code Civ. Proc. § 1258.260 (amended). Contents of statement of valuation data**
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> 1258.260. (a) The statement of valuation data shall give the name and business or residence address of the witness and shall include a statement whether the witness will testify to an opinion as to any of the matters listed in Section 1258.250 and, as to each ~~such~~ matter upon which ~~he~~ the witness will give an opinion, what that opinion is and the following items to the extent that the opinion ~~on such matter~~ is based ~~thereon~~ on them:
>
> (1) The interest being valued.
>
> (2) The date of valuation used by the witness.
>
> (3) The highest and best use of the property.

(4) The applicable zoning and the opinion of the witness as to the probability of any change in ~~such~~ zoning.

(5) The sales, contracts to sell and purchase, and leases supporting the opinion.

(6) The cost of reproduction or replacement of the existing improvements on the property, the depreciation or obsolescence the improvements have suffered, and the method of calculation used to determine depreciation.

(7) The gross income from the property, the deductions from gross income, and the resulting net income; the reasonable net rental value attributable to the land and existing improvements ~~thereon~~, and the estimated gross rental income and deductions ~~therefrom~~ upon which ~~such~~ the reasonable net rental value is computed; the rate of capitalization used; and the value indicated by ~~such~~ the capitalization.

(8) If the property is a portion of a larger parcel, a description of the larger parcel and its value.

(9) If the opinion concerns loss of goodwill, the method used to determine the loss and a summary of the data supporting the opinion.

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Comment. Paragraph (9) is added to Section 1258.260(a) to make clear that the basis for an opinion as to loss of goodwill is to be included in the exchange of valuation data. This codifies the rule in *City of Fresno v. Harrison*, 154 Cal. App. 3d 296, 201 Cal. Rptr. 219 (1984).

Technical revisions are also made to the statute for consistency with contemporary statutory drafting techniques.

In this connection, the Commission has also recommended that the claims of the parties on loss of business goodwill be made a part of their final offers and demands:

Code Civ. Proc. § 1250.410 (amended). Pretrial settlement offers

1250.410. (a) At least 20 days prior to the date of the trial on issues relating to compensation, the plaintiff shall file with the court and serve on the defendant its final offer of compensation in the proceeding and the defendant shall file and serve on the plaintiff its final demand for compensation in the proceeding. The offer and the demand shall include all statutorily and constitutionally required compensation, including compensation for loss of goodwill if any, and shall state whether interest and costs are included. Such offers and demands shall be the only offers and demands considered by the court in determining the entitlement, if any, to litigation

expenses. Service shall be in the manner prescribed by Chapter 5 (commencing with Section 1010) of Title 14 of Part 2.

(b) If the court, on motion of the defendant made within 30 days after entry of judgment, finds that the offer of the plaintiff was unreasonable and that the demand of the defendant was reasonable viewed in the light of the evidence admitted and the compensation awarded in the proceeding, the costs allowed pursuant to Section 1268.710 shall include the defendant's litigation expenses.

In determining the amount of such litigation expenses, the court shall consider the offer required to be made by the plaintiff pursuant to Section 7267.2 of the Government Code and any other written offers and demands filed and served prior to or during the trial.

(c) If timely made, the offers and demands as provided in subdivision (a) shall be considered by the court on the issue of determining an entitlement to litigation expenses.

Comment. Subdivision (a) of Section 1250.410 is amended to counteract dictum in cases to the effect that the provision is not intended to require the offer and demand to cover items other than the value of the part taken and damage, if any, to the remainder. See, e.g., Coachella Valley County Water Dist. v. Dreyfuss, 91 Cal. App. 3d 949, 154 Cal. Rptr. 467 (1979); People *ex rel.* Dep't of Transp. v. Gardella Square, 200 Cal. App. 3d 559, 246 Cal. Rptr. 139 (1988).

The amendment makes clear that the final offer and demand should include all statutorily or constitutionally required compensation, including compensation for loss of goodwill. Although interest and costs are not covered by this provision, the amendment also requires, for the purpose of clarity, that each offer and demand also indicate whether or not interest and costs are included.

These proposals are currently being considered for inclusion in an Assembly Judiciary Committee omnibus civil practice bill. If they are not included, the Commission has suggested they could be made part of the early exchange of valuation data and resolution of issues package.

EARLY RESOLUTION OF LEGAL ISSUES

Earlier exchange of valuation data will also better enable resolution of legal issues on which valuation disputes may hinge. If we assume an exchange 90 days before trial, and allow the parties 20 days to examine the data and focus on the

nature of their dispute, we could authorize resolution of legal issues immediately thereafter.

> **Code Civ. Proc. § 1260.040 (added). Resolution of legal issues affecting valuation**
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> 1260.040. If there is a dispute between plaintiff and defendant over an evidentiary or other legal issue affecting the determination of compensation, either party may move the court for a ruling on the issue. The motion shall be made not later than 70 days before commencement of the trial. The motion shall be heard not later than 45 days before commencement of the trial. The court shall make its ruling on the motion not later than 10 days after conclusion of the hearing.
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> **Comment.** Section 12160.040 is intended to provide a mechanism by which a party may obtain early resolution of an *in limine* motion or other dispute affecting valuation. Nothing in this section precludes the use of other procedures for the same purpose, including, without limitation, bifurcation of issues and control of the order of proof pursuant to statute or other pretrial procedure pursuant to court rule.

This scheme would provide the responding party three weeks to prepare for the hearing and, assuming a one or two-day hearing, at least two weeks after the judge's ruling before it must make its final offer or demand.

Timing Issues

One question about the proposed scheme is whether it allows enough time following exchange of valuation data to complete expert witness depositions and other necessary discovery, before the motion to resolve legal issues must be made. Caltrans attorneys have indicated that 30 days would appear to be a reasonable period. Is the 20 days allowed by the current draft satisfactory? Discussion at the February meeting seemed to indicate this might be workable.

Under the draft scheme there may be 35 days or fewer between the time the court resolves the legal issues and the time the trial is scheduled to commence. Will this be enough time for a party to prepare and exchange new appraisal data if the court rules that the party's appraiser's testimony is inadmissible? Caltrans attorneys have expressed concern that even 60 days might not be enough time, and the current proposal cuts that period in half.

One obvious approach would be to reduce the 10 days allowed in the draft for the court to make its decision. Another approach would be to add a provision

allowing the court to extend time on a showing that the resolution of legal issues necessitates it.

> Notwithstanding any other statute or rule of court governing the date of trial of an eminent domain proceeding, the court may postpone the date of trial for a period sufficient to enable further proceedings before trial in response to its ruling on the motion.

Same Judge for Pretrial and Trial Proceedings

While Norm Matteoni likes the idea of early resolution of legal issues, he thinks the same judge who handles the legal issues should also handle the valuation trial. This ordinarily would be more a matter of efficient judicial administration than eminent domain procedure; we have not included the concept in this draft.

ENCOURAGE ALTERNATIVE DISPUTE RESOLUTION

The Commission has decided to encourage alternative dispute resolution in eminent domain proceedings. We have identified two issues that could impair use of ADR — (1) condemnor reluctance to use ADR, and (2) limited time available for ADR.

Condemnor Reluctance To Use ADR

At the February meeting, Gideon Kanner indicated that some public agencies resist alternative dispute resolution. Caltrans representatives indicated that Caltrans supports mediation, after valuation data have been exchanged. The Commission's experience with other state agencies in the context of its administrative procedure study was that state agencies may be unsure whether they have authority to engage in ADR, for various reasons.

One outcome of the administrative procedure project was that the Legislature enacted a measure, recommended by the Commission, intended to foster use of ADR by state agencies. A similar measure might be helpful for eminent domain proceedings:

> **Code Civ. Proc. §§ 1250.410 (amended). Article heading**
> Article 6. Settlement Offers <u>and Alternative Dispute Resolution</u>

Code Civ. Proc. § 1250.420 (added). ADR authorized

1250.420. The parties may by agreement refer a dispute that is the subject of an eminent domain proceeding for resolution by any of the following means:

(a) Mediation by a neutral mediator.

(b) Binding arbitration by a neutral arbitrator. The arbitrator's decision in a binding arbitration is subject to judicial review in the manner provided in Chapter 4 (commencing with Section 1285) of Title 9 of Part 3.

(c) Nonbinding arbitration by a neutral arbitrator. The arbitrator's decision in a nonbinding arbitration is final unless within 30 days after the arbitrator's decision a party moves the court for a trial of the eminent domain proceeding. If the judgment in the eminent domain proceeding is not more favorable to the moving party, the moving party shall, notwithstanding any other statute, pay the costs and litigation expenses of the parties in the eminent domain proceeding.

Comment. Section 1250.420 is drawn from Government Code Section 11420.10 (ADR authorized in administrative adjudication). The section is intended to remove any question about the authority of a public entity to refer an eminent domain dispute for alternative dispute resolution.

Under subdivision (a), the mediator may use any mediation technique.

Subdivision (c) parallels the procedure applicable in judicial arbitration. See Code Civ. Proc. §§ 1141.20-1141.21.

Standard protections of confidentiality of communications made in alternative dispute resolution apply to alternative dispute resolution pursuant to this section. See, e.g., Evid. Code §§ 1115-1128 (mediation); Evid. Code § 703.5 (testimony by arbitrator or mediator).

Limited Time Available For ADR

Michael Nave believes that in order for mediation to be effective in eminent domain, discovery and *in limine* motions should first be completed. He indicated at the February meeting that the procedure outlined above for resolution of legal issues (approximately 35 days before trial) could still leave sufficient time for ADR, although more time would be helpful.

One option the Commission may wish to consider is to allow the court to waive fast track rules if the parties are actively engaged in ADR. This could take some of the pressure off what would otherwise be a very tight schedule. Something along the following lines could be appropriate:

Code Civ. Proc. § 1250.430 (added). Stay of trial during ADR

1250.430. Notwithstanding any other statute or rule of court governing the date of trial of an eminent domain proceeding, on motion of a party and demonstration to the court that all of the following conditions are satisfied, the court may postpone the date of trial for a period that appears adequate to enable resolution of a dispute pursuant to alternative resolution procedures:

(a) The parties are actively engaged in alternative resolution of the dispute under Section 1250.420.

(b) The parties appear to be making progress toward resolution of the dispute without the need for a trial of the matter.

(3) The parties agree that additional time for the purpose of alternative dispute resolution is desirable.

Comment. Section 1250.430 is intended to allow waiver of trial court delay reduction programs and other case processing requirements in order to facilitate productive alternative dispute resolution. This provision may be applied to foster resolution of some or all of the issues between the parties.

CONCLUSION

If the Commission is satisfied that the proposals in this memorandum are sound, either as drafted or as revised at the meeting, we will assemble them in a draft tentative recommendation to be circulated for comment.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary